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# Supreme Court of the United States

**October Term, 1947.**

No. [redacted] 62

HAROLD SPINA, EDWARD HEYMAN, WALTER HANNAN, EDMUND PAUKER and THE DRAMATISTS' GUILD OF THE AUTHORS' LEAGUE OF AMERICA, INC.,

*Petitioners-Defendants,*

AGAINST

CARL E. RING,

*Respondent-Plaintiff.*

**Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

JONAS J. SHAPIRO,
*Attorney for Petitioner the Authors' League of America, Inc., sued herein as The Dramatists' Guild of the Authors' League of America, Inc.*

*Of Counsel:*
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**Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.**

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioners, Harold Spina, Edward Heyman, Walter Hannan, Edmund Pauker and The Authors' League of America, Inc., sued herein as The Dramatists' Guild of the Authors' League of America, Inc., respectfully apply for the allowance of a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit, entered on March 1, 1948 (R. 81),* entered on a

*References are to page numbers in the Record, and, where it might be helpful to the Court, also to folio numbers thereon by use of the symbol (f).

decree (1) reversing an order of the District Court for the Southern District of New York entered on January 20, 1947 (R. 5) and (2) denying motions made by petitioners to dismiss the appeal on the ground that the order of the District Court was not appealable (R. 71, 73).

The order of the District Court which was reversed granted so much of petitioners' motions as asked to strike the cause from the jury calendar of the court. The District Court granted leave to the respondent, if he be so advised, to amend his complaint so as to state a cause of action at law for damages (R. 5).

## Opinion of the Court Below.

The District Court (RIFKIND, *D. J.*) filed no opinion. The Circuit Court of Appeals in reversing the order below and in denying petitioners' motions wrote an opinion (R. 74-80), per CLARK, *C. J.*, which is reported at 166 F. (2d) 546.

## Jurisdiction.

The jurisdiction of this Court is invoked under Judicial Code §240(a), 28 U. S. C. §347(a). The judgment of the Circuit Court of Appeals was entered on March 1, 1948 (R. 81). The petitioner, The Authors' League of America, Inc., petitioned for a rehearing, the petition being filed on March 16, 1948 (R. 82); the petition for rehearing was denied by order of the Circuit Court of Appeals entered March 23, 1948 (R. 103).

## Questions Presented.

1. Is an order of the general Motion Part of the District Court striking the cause from the jury calendar with leave to the respondent to amend his complaint, ap-

pealable under 28 U. S. C. §227, where the complaint in a single count commingles legal and equitable claims for relief, where the petitioners did not interpose any counterclaim, and where only one "side" of the District Court has been invoked, be that "side" legal or equitable?

2. Can a complaint which in a single count demands injunctive and declaratory relief, as well as money damages, arising out of an alleged violation of the Anti-Trust Laws of the United States be characterized a "legal" cause of action entitling the plaintiff to a jury trial on all of the issues, including the equitable ones?

3. Since the Federal Rules of Civil Procedure did not abolish the distinction between law and equity for the purpose of determining whether an order of the District Court was appealable under 28 U. S. C. A. §227, did they abolish the distinction between them for the purpose of determining whether an action is at law or in equity for the purposes of jury trial?

4. When a clause of the contracts involved herein requires arbitration of all disputes and when the complaint asks for a permanent injunction against arbitration, can it be said that the equitable relief prayed in the complaint is "academic", when without such an injunction the Federal Courts would be ousted of jurisdiction?

5. Do the Federal Rules of Civil Procedure contemplate that the District Court, prior to the commencement of the trial, and despite timely motion, may not separate legal and equitable issues and order the equitable issues tried to the court, or is such determination to await the trial itself?

## Statutes Involved.

The statute relevant to the appealability of the order of the District Court to the Circuit Court of Appeals provides as follows:

> "**Appeals in proceedings for injunctions and receivers.** Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, * * * an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; * * *"
>
> Judicial Code, §129, 28 U. S. C. §227.

The provisions of the Anti-Trust Laws here involved are as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *"
>
> 15 U. S. C. §1.

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."
>
> 15 U. S. C., §15.

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue: * * *"

15 U. S. C., §26.

The Federal Rule of Civil Procedure herein involved provides in part as follows:

"Trial by jury or by the court.

(a) By jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless * * * the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Rule 39.

**Specification of Error.**

The Circuit Court of Appeals erred in reversing the order of the District Court and in denying the petitioners' motions to dismiss the appeal, and in failing to affirm such

order or dismiss such appeal. The Circuit Court of Appeals erred further in refusing, upon petition for rehearing, to clarify its mandate to allow the general motion part of the District Court to rule at this time on the other alternatives in petitioners' motions.

## Summary Statement of the Matters Involved.

### Description of Parties and Summary Statement of Facts.

The petitioners Harold Spina, Edward Heyman and Walter Hannan, are authors who wrote and composed a dramatico-musical play entitled "Stovepipe Hat" (R. 20, ff. 58-59). They are sometimes hereinafter collectively referred to as "Authors." The petitioner Edmund Pauker is the Authors' literary agent. The Authors entered into contracts with one Irving Gaumont granting him the right to produce on the living stage "Stovepipe Hat" (R. 12-13, 20). These contracts are sometimes hereinafter referred to as the "Production Contracts" (R. 13). The Production Contracts had incorporated in them by reference a certain agreement known as the Minimum Basic Agreement (R. 12-13).

The petitioner Authors' League of America, Inc. is a membership corporation having as members persons who earn their livelihood in various fields of writing endeavor (R. 12-13, 67). Included among them are members whose literary efforts are directed to the writing of plays for production on the living stage (R. 66, f. 197). Within the framework of the Authors' League such members are assigned to a division known as the "Dramatists' Guild." The Dramatists' Guild, to prevent the improper exploitation of its members and to see that they are properly compensated for their work, has negotiated with producers the Minimum Basic Agreement which, as its name implies, contains the minimum terms on which a playright will contract with a producer for the production of a play written or to be written by each author (R. 12-13, 64).

As must be apparent, this Minimum Basic Agreement does not grant any right to produce any particular play (R. 12). The Dramatists' Guild does not own or control any plays. The right to produce a particular play is always the subject of a separate contract, separately negotiated between a particular author and a particular producer (R. 20, 66). In this case, as already noted, the right to produce "Stovepipe Hat" was granted by separate contracts between the Authors and Irving Gaumont.

The respondent is a person who at first invested money with Gaumont in the latter's contemplated production of the play (R. 21). Disputes having thereafter arisen between the respondent and Gaumont (R. 23)—none of the petitioners herein was party to said disputes—respondent became the assignee of Gaumont's rights under the production contract with the Authors (R. 41-44).

Respondent then continued with the production of the play and it opened for tryout performances (R. 23, ff. 68-69).

During these tryout performances disputes arose between respondent and the Authors relating to unauthorized changes in the play made by the respondent (R. 13, ff. 38-39, not denied). The Authors gave notice that this was a breach of their agreement and unless the breach was corrected within three days, the Authors would terminate the contracts under which respondent was producing the play (R. 45). Respondent, without replying and without waiting the three days, at the end of the second day closed the play during the tryout period (R. 50). Further disputes then arose between the respondent and the Authors—the latter contending that respondent's production rights under the contract had terminated (R. 45-46) and the respondent contending that he still continued to have the production rights under the contract (R. 47).

The Production Contract containing, as it does, a provision for arbitration under the auspices of the American Arbitration Association (R. 30), the Authors demanded arbitration (R. 49-50). This demand went through petitioner Authors' League, which acted merely as a conduit (R. 51-53).

This action was then commenced.

The complaint herein, characterized by the Court below (R. 77) as "a lengthy and verbose document of some fifty-three paragraphs", alleges a single cause of action, which by respondent's own statement, is under the Anti-Trust Laws of the United States (R. 14). It specifically alleges that "liability herein is based upon §§1, 15 and 26 of Title 15 of the U. S. Code Annotated" (R. 19-20). It further alleges that the Minimum Basic Agreement "is null and void and contrary to public policy as being a contract, combination or conspiracy in restraint of trade in direct violation of Section 1, Title 15 of the U. S. Code Annotated" (R. 26-27). Other allegations are introduced into the complaint in support of this alleged claim by the respondent as to the Minimum Basic Agreement (see *e. g.* R. 30-33). On the basis of this claim, respondent asks, among other things (R. 37), that the Minimum Basic Agreement be declared illegal, null and void and that (pursuant to 15 U. S. C., §26) a temporary and permanent injunction issue against the petitioners and against the directors and officers of the Dramatists Guild enjoining them from enforcing any of the terms of the Minimum Basic Agreement against the respondent. The complaint also prays (R. 37) that the enforcement of the arbitration clause in the Minimum Basic Agreement be enjoined, and for injunctions (R. 38) against the authors to prevent their interfering with the production of the play by respondent and depriving them of royalties or other compensation payable to them. The complaint also demands declaratory relief (R. 37) that the plaintiff is

entitled to produce the play without interference from the authors and for a declaration that their copyright* thereof be declared unenforceable due to their having been engaged in "illegal monopolistic practices in connection therewith." All of these are in addition to the treble damages claimed (R. 36) by respondent in the complaint.

The answer of the petitioners Spina, Heyman and Hannan (R. 54-58) contains only denials and allegations that a valid arbitration clause exists in the contract and that it should be enforced. The answer of petitioner Pauker (R. 59-61) contains only denials. The answer of petitioner Authors' League of America, Inc. (R. 62-67), in addition to denials, contains affirmative defenses that the respondent did not carry out the obligations of his assignor, Gaumont, even though he agreed to perform them; that the subject matter of the contract is not commerce; that in any event it is not interstate commerce; that the Dramatists' Guild is a labor organization within the purview of Section 17, 15 U. S. C. A., and thereby exempt from the operation of the anti-trust laws; and that neither the Minimum Basic Agreement nor any other act of the Guild had any effect upon the price payable by the public for theatre tickets.

*None of the answers contain counterclaims or seek any affirmative relief.* Thus, the petitioners cannot be said to have invoked the jurisdiction of a "side" of the District Court different from that invoked by the respondent. On the contrary, they submitted themselves to the very "side" chosen by the respondent.

Respondent demanded jury trial—not merely of his claimed right to damages, but seemingly of all the issues including his claimed right to injunctive and declaratory relief.

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*There is no allegation that the play has a statutory copyright.

The petitioners moved in the General Motion Part of the District Court to strike this cause from the jury calendar, or alternatively for a separation of the legal and equitable issues herein and a direction that the equitable issues be tried by the court without a jury, or in the alternative that the issues of violation of the Anti-Trust Act be tried by the court without a jury, and if violation be found then the issue of damages be referred to the jury (R. 6-7).

Since, as already seen, petitioners, by their pleadings had not invoked a "side" of the court different from that invoked by respondent, they were not, by their motions or otherwise, requesting an equity court to enjoin a law court or a law court to enjoin an equity court (if that be possible); rather they were requesting the very court whose jurisdiction the respondent had invoked to determine an interlocutory question of practice. The District Court accordingly granted petitioners' motion to strike the cause from the jury calendar of the Court with leave to respondent, if he be so disposed, to amend his complaint so as to state a cause of action at law (R. 4-5).

On that basis, it became unnecessary for the District Court to decide the alternatives of petitioners' motions.

The Circuit Court of Appeals reversed, holding in effect that since the injunctive and declaratory relief sought by respondent was "academic" and "gildings of the lily," the action was at law—this in the face of respondent's refusal to amend his complaint pursuant to the leave granted by the District Court order, so as to drop those claims and limit his action to one for damages.

Seemingly also, Judge CLARK, who wrote for the Circuit Court of Appeals, reasserted his theory that the new Federal Rules had abolished the distinction between law and equity (R. 79)—a theory previously asserted by Judge CLARK in *Beaunit Mills Inc.* v. *Eday Fabrics Sales*

*Corp.*, 2 Cir., 124 F. (2d) 563 and rejected by this Court in *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188.

After the decision in the Circuit Court of Appeals reversing the District Court's order and denying petitioners' motions to dismiss the appeal for lack of jurisdiction to entertain such appeal, petitioners moved for rehearing (R. 82, *et seq.*). In such petition for rehearing, the petitioners prayed, *inter alia,* for a clarification by the Circuit Court of Appeals of its mandate to allow the District Court to rule on the other alternatives in the petitioners' original motion made in the District Court. This petition for rehearing was denied (R. 103).

## REASONS FOR ALLOWANCE OF WRIT.

1. The District Court order was not appealable to the Circuit Court of Appeals, and the decision of the Court below that it was is in probable conflict with decisions of this Court, with those of other Circuit Courts of Appeal and of the Court below.

2. Since a complaint seeking injunctive relief and damages arising out of an alleged violation of the Anti-Trust Act is wholly in equity, it was error for the Court below to call the complaint legal; its reversal of the order of the District Court which struck the cause from the jury calendar is in probable conflict with applicable decisions of this Court and of other Circuit Courts of Appeal, and with decisions of the Court below itself.

3. Since the Federal Rules did not abolish the distinction between law and equity for the purpose of determining appealability of the order of the District Court to the Court below, they did not abolish that distinction for the purpose of determining the issue of jury trial.

4. The court below struck down a salutary reform of the Rules by denying a separation of issues in advance of trial.

5. This Court should grant certiorari herein even though the decision upon which appeal is sought is not a final decision.

## POINT I.

**The District Court order was not appealable to the Circuit Court of Appeals, and the decision of the Court below that it was is in probable conflict with decisions of this Court, with those of other Circuit Courts of Appeal and of the Court below.**

The Court below denied petitioner's motion to dismiss the appeal upon the ground that "the action is one of legal aspect" (R. 77) and that the order of the District Court appealed from was "an injunction against an action at law" (R. 77). Therefore, the order of the District Court striking the cause from the Jury Calendar was held appealable under 28 U. S. C. §227 as an interlocutory injunction. In so ruling the Court below purported to follow the decisions of this Court in *Enelow* v. *New York Life Insurance Co.*, 293 U. S. 379 and *Ettelson* v. *Metropolitan Life Insurance Co.*, 317 U. S. 188. Actually only lip-service was paid to these decisions and they were not followed unless it be that other Circuit Courts of Appeal have misinterpreted those cases (see *infra*).

The *Enelow* case involved an action to recover on a life insurance policy and an affidavit of defense and prayer for cancellation based on fraudulent representations by the applicant interposed by the insurance company. Upon petition of the insurance company, the District Court held that the equitable issue of fraud would be tried by a chancellor in equity in advance of the trial of the equitable issues. This Court held that the order of the District Court was appealable to the Circuit Court of Appeals under 28 U. S. C. §227 since the order was an injunction

by the chancellor of an action at law. That case arose before the new Rules.

The *Ettelson* case arose after the promulgation of the Federal Rules of Civil Procedure in 1938 and involved practically identical facts, except that the defendant by counterclaim demanded cancellation of the insurance policies due to fraud. There having been *dicta* in several cases, among them *Beaunit Mills Inc.* v. *Eday Fabrics Sales Corp.*, 2 Cir., 124 F. (2d) 563, to the effect that the Federal Rules, having abolished the distinction between law and equity, had made the *Enelow* decision obsolete, both parties cited and discussed the *Beaunit* case when the *Ettelson* case was argued before this Court. This Court rejected that *dicta* and the contention based thereon, denied that the Federal Rules had abolished the distinction between law and equity, and held that the relief afforded by 28 U. S. C. §227 depended not on the terminology used but by the substance of the order made; since the decision of the District Court had been an injunction against an action at law, the order was appealable.

The various Circuit Courts of Appeal which have had for consideration the doctrine of the *Enelow-Ettelson* cases have invariably come to the conclusion that it applies where the jurisdiction of the District Court, in its separate capacities as a court of law and a court of equity, is invoked by each of the opposing parties by the separate pleadings; the effect is as though separate actions were brought in different courts of law and equity and the Chancellor is enjoining the law court; but the doctrine does not apply where, as here, but one side of the court is invoked, be that the law side or the equity side.

*Bereslavsky* v. *Caffey*, 2 Cir., 161 F. (2d) 499, cert. den. 332 U. S. 770;

*Bereslavsky* v. *Kloeb*, 6 Cir., 162 F. (2d) 862, cert. den. 332 U. S. 816;

*Dowling Bros. Distilling Co.* v. *U. S.*, 6 Cir., 153 F. (2d) 353;
*United States* v. *Horns*, 3 Cir., 147 F. (2d) 57.

In this latter type of case one does not have a chancellor enjoining a law judge, thus differing from the *Enelow-Ettelson* cases, but rather a chancellor *or* a law judge regulating, by non-appealable interlocutory order, the trial procedure of a case pending in whole before him. This is in accord with the historical development of code pleading since prior to the fusion of courts of law and equity, an equitable counterclaim to a legal action was made by way of a separate cross-action in equity. However, the *Enelow-Ettelson* doctrine presupposes either a complaint at law and a counterclaim in equity, or a complaint in equity and a counterclaim at law. It is of the essence of that doctrine that there be two different "sides" (law "side" and equity "side") of the District Court involved, otherwise the carefully drawn basis of decision is rendered meaningless. In the case at bar, due to the absence of counterclaims and cross-actions, only *one* "side" is involved—that invoked by the respondent in his complaint.

Therefore, the *Enelow-Ettelson* doctrine when applied to the facts *sub judice*, reveals that no appealability exists as to the order of the District Court striking the cause from the jury calendar.

The decision of the Court below in holding the order of the District Court is appealable is, therefore, in conflict with the decisions of this Court in the *Enelow* and the *Ettelson* cases. Whether the "side" of the District Court invoked by respondent's complaint was legal or equitable, the petitioners invoked no other "side". There could, therefore, have been no equivalent of an injunction by the equity "side" of the law "side".

Moreover the decision of the Court below is in conflict with applicable decisions in other Circuit Courts of Appeals and with its own previous decisions.

If the cause is wholly in equity, as we insist (*infra*, Point II), because only an equity court can grant all the relief sought by respondent, the previous decision of the Court below in the *Beaunit Mills* case*, *supra*, requires that the appeal should have been dismissed. In the *Beaunit Mills* case, it was decided that when both adversaries in the litigation submitted themselves to the same side of the District Court, in that case the equitable side, it was impossible to say that the Chancellor had enjoined himself to await the action at law in annuling the demand for a jury trial. The opinion (per Clark, *C. J.*) stated (124 F. 2d at 564, 565):

> "First, this case is not the *Enelow* case, for this (if we use the old labels) is an equity action where the chancellor refuses to dismiss on a claim of want of equity because of adequacy of remedy at law. *There was no practice whereby the chancellor enjoined himself to await an action at law.* Rather, the matter came up on demurrer, whose overruling was purely interlocutory, until further action was had by the court. Clephane, Equity Pleading and Practice, 200, 232. This we have held in the exact situation now before us. *Childs* v. *Ultramares Corp.*, 2 Cir., 40 F. 2d 474, 478, 479. Defendants adroitly suggest that a jury demand under Rule 38, Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, automatically removes the case to law, and that the judge's action in 'annulling' the jury demand is therefore a removal back to equity, and hence an Enelow injunction. But

*Although this Court in the *Ettelson* case did, without specific reference, condemn the *dictum* in the *Beaunit* case to the effect that the Rules abolished the distinctions between law and equity, it did not overrule the *Beaunit* case for the reason that on its facts the decision itself was correct, namely, that the whole case was on one side of the Court. The Circuit Court of Appeals had properly observed that "this is not the *Enelow* case" (124 F. [2d] at p. 564), even though defendant's amended counterclaim to plaintiff's claim for injunctive relief was for injunctive relief and damages.

> this would convert into a binding and important judgment of the court what is only a device of convenience operated solely by the parties to enable jury waiver to operate smoothly and automatically. * * * *As all the cases cited above concede, that is an interlocutory order, not appealable unless it can be brought under the limited right granted in the injunction cases. And we think the above analysis shows that by no standards can this order be considered either the grant or denial of an interlocutory injunction against an assumed, but obviously nonexistent, action 'at law'.*" (Italics ours.)

Even if the Court below is correct in stating that the equitable relief is "academic" and that the complaint is purely legal, the same result follows, because then we have an action wholly on the law side. Thus, in *Dowling Bros. Distilling Co.* v. *U. S.*, 6 Cir., 153 F. (2d) 353, it was held (at page 356):

> "As pointed out, however, in *United States* v. *Horns*, 3 Cir., 147 F. 2d 57, the Supreme Court made it clear in the *Enelow* case, that if a court of law itself grants a stay of proceedings before it, the stay is not an injunction but merely an exercise of the court's inherent power to control the progress of a cause before it, so as to maintain the orderly processes of justice. *It is only when the power possessed by a court of equity is exercised to stay proceedings in another cause that such action amounts to the grant or refusal of an injunction,* and this distinction was stressed in *Cover* v. *Schwartz*, 2 Cir., 112 F. 2d 566." (Italics ours.)

Therefore, even if the complaint is legal, there being no counterclaims, the order of the District Court was merely

an interlocutory ruling in a law action and was not appealable. The petitioners' motion to dismiss the appeals accordingly should have been granted.

Moreover, the same rule is discernible in the *ratio decidendi* of the cases of *Bereslavsky* v. *Caffey*, 2 Cir., 161 F. (2d) 499, cert. den. 332 U. S. 770 and *Bereslavsky* v. *Kloeb*, 6 Cir., 162 F. (2d) 862, cert. den. 332 U. S. 816. In both cases there was involved an original complaint for both injunctions and damages, later amended so as to state a claim solely for damages, on which amended complaint a timely demand for jury trial was made. The District Courts in both cases having granted motions to strike the jury demand, the Circuit Courts of Appeal for the Second and Sixth Circuits granted mandamus after a careful consideration of their power to grant the writ in such cases. §262 of the Judicial Code, 28 U. S. C. A., §377, providing for the issuance of such writ of mandamus contains an implicit limitation that the writ should not issue where the decision of the court below was subject to review on appeal. As this Court said in *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 27-30:

> "Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record * * * (citing cases). * * * Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts. * * * "

Thus, in holding that the Circuit Court of Appeals had jurisdiction in each case to issue mandamus, both *Bereslavsky* decisions hold by necessary implication that when the complaint stated a claim "solely at law" without any equitable counterclaims in the answer, the order vacating the jury demand was not appealable under 28 U. S. C. §227.

It requires no argument to prove that the appeal to the Circuit Court of Appeals cannot be sustained as one from a final order within the meaning of §128 of the Judicial Code, 28 U. S. C. §225. It is clear that the order of the District Court was not intended to be final and it cannot be so considered. The Court below conceded this (R. 76) and rested its decision on appealability solely on 28 U. S. C. A. §227.

Nor is this question inextricably intertwined with the issue of the right to jury trial as the Court below said it was (R. 77). The *Beaunit Mills, Dowling Bros. Distilling Co., Horns* and *Bereslavsky* cases, *supra,* all hold that appealability is determined from a simple decision as to whether the defendant has invoked a side of the court different from that invoked by the plaintiff—not from a determination of whether jury trial should be granted or withheld. This flows from the clear mandate of this Court in the *Enelow* and *Ettelson* cases. Therefore, when the Court below finds, as it did in the case at bar that "the action [is] one of legal aspect" (R. 77) it has explicitly placed the case within the doctrine of the cases requiring a dismissal of the appeal.

In ignoring the rationale of the decision in the *Ettelson* case, the Court below characterizes it as "gloss upon the statute" (R. 76). If evidence is needed to show that the Court below treated it as very thin gloss, it can be found in the part of the decision dealing with jury trial, where as we point out (*infra,* Point III) the decision states that the distinction between law and equity for the purpose of determining legal and equitable claims has been abolished.

In view of the probable conflict between the decision below and applicable decisions of this Court and of other Circuit Courts of Appeal, this Court should grant petitioner's writ to decide the extremely important question of Federal Law involving the appealability of orders of

the District Court under 28 U. S. C. §227 raised by this case, which question has not been, but should be, decided by this Court.

## POINT II.

**Since a complaint seeking injunctive relief and damages arising out of an alleged violation of the Anti-Trust Act is wholly in equity, it was error for the Court below to call the complaint legal; its reversal of the order of the District Court which struck the cause from the jury calendar is in probable conflict with applicable decisions of this Court and of other Circuit Courts of Appeal, and with decisions of the Court below itself.**

The decision of the Court below is in probable conflict with numerous decisions of this Court, among others, those in *Russell* v. *Clarke's Executors*, 7 Cranch 69, *Camp* v. *Boyd*, 229 U. S. 530 and *N. L. R. B.* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1. It is also in probable conflict with the decisions of other Circuit Courts of Appeals in *Bereslavsky* v. *Kloeb*, 6 Cir., 162 F. (2d) 862, cert. den. 332 U. S. 816, *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 6 Cir., 233 Fed. 609, rev'd on other grounds, 249 U. S. 100, and with its own previous decisions in *Bereslavsky* v. *Caffey*, 2 Cir., 161 F. (2d) 499, cert. den. 332 U. S. 770, and *Beaunit Mills* v. *Eday Fabric Sales Corp.*, 2 Cir., 124 F. (2d) 563.

### A. Since the Complaint Commingles Claims for Injunctive Relief and Legal Damages, It Is One Wholly in Equity Which Traditionally Has Granted That Type of Relief. It Was Error for the Court Below to Treat the Action as One of Legal Aspect Where the Sole Claim Is Not for Money Damages.

The complaint makes the jurisdictional allegation that "liability herein is based upon §§1, 15 and 26 of Title 15

of the U. S. Code Annotated, commonly referred to as Anti-Trust Laws" (R. 19-20). §1 of that statute declares contracts in restraint of trade illegal; §15 creates a right to sue for damages; and §26 creates a right of injunctive relief. From the complaint itself, therefore, it is obvious that the complaint has in a single cause of action commingled both injunctive relief and statutory damages. This is borne out by the prayers for relief, wherein, pursuant to the aforesaid statutes, respondent prays for (R. 36-38): temporary injunctions; permanent injunctions; a declaratory judgment; and damages.

Where the complaint contains a claim for damages in addition to claims for equitable relief, it is clearly settled by the decisions of this Court that the suit is wholly in equity and is not transformed into an action at law merely because it contains a claim for damages, or because appellant has filed a demand for a jury trial. Where the complaint commingles claims for both equitable relief and damages, the entire suit is to be tried in equity, notwithstanding that the claim for damages alone might have been at law.

> *Russell* v. *Clarke's Executors,* 7 Cranch 69, 89;
> *Kinney-Coastal Oil Co., et al.* v. *Kieffer, et al.,* 277 U. S. 488;
> *McGowan* v. *Parish,* 237 U. S. 285;
> *Camp* v. *Boyd,* 229 U. S. 530, 551-552.

This Court in *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, stated that the provisions of the Seventh Amendment to the United States Constitution do not require jury trial in all contexts—it:

> "• • • has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law (citing cases). It does not

apply where the proceeding is not in the nature of a suit at common law (citing cases)." (301 U. S. at 48.)

The rationale of this rule is that equity, having assumed jurisdiction, should go on to afford complete relief (*Camp* v. *Boyd*, 229 U. S. 530, 551-552). Since the Chancellor in ancient equity would have awarded damages if an injunction were not granted, the claim for damages does not in itself entitle the plaintiff to a jury trial on all of the issues (*cf. Gulbenkian* v. *Gulbenkian*, 2 Cir. 147 F. [2d] 173, 176).

Since respondent's claim is not exclusively for money, he has no right to a jury trial, *Bereslavsky* v. *Caffey*, 2 Cir., 161 F. (2d) 499, cert. den. 332 U. S. 770; *Bereslavsky* v. *Kloeb*, 6 Cir., 162 F. (2d) 862, cert. den. 332 U. S. 816. In *Bereslavsky* v. *Caffey*, the plaintiff had demanded preliminary and final injunctions together with profits and damages. The Court below characterized that complaint (prior to its amendment) as being (161 F. [2d] at 500) "exclusively in equity", and therefore there was no right to a jury trial since "it is well settled that such a trial may be demanded where the *sole* claim is for money" (italics ours).* The same result was reached by the Circuit Court of Appeals for the Sixth Circuit in *Bereslavsky* v. *Kloeb, supra*. It may well be that in this action which seeks injunctive relief against violations of the Sherman Act, the respondent may not recover any damages whatever. *Decorative Stone Co.* v. *Building Trades Council*, 2 Cir., 23 F. (2d) 426. If this be so, then the complaint is not even a commingled one, but is solely for equitable relief regardless of the damages claimed.

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*Eastman Kodak Co. v. McAuley, D. C. S. D. N. Y., 4 Fed. Rules Serv. 38a 71, Case 2: "Defendants are likewise entitled to a jury trial in an action at law for violation of Clayton and Sherman antitrust statutes and upon the issue of unfair competition, *where they are suing for money damages only.*" (Italics ours.)

Even if we concede *arguendo* that the respondent may recover damages for his alleged injury, the result is not changed. If we try to weigh the legal and equitable claims for relief to see which are dominant and which are secondary, it is apparent from the complaint that the equitable claims are dominant and the claims for damages are merely incidental thereto since only equity can give the respondent *all* the relief he demands. In *L. A. Westermann Co.* v. *Dispatch Printing Co.*, 6 Cir., 233 Fed. 609, rev'd on other grounds, 249 U. S. 100, the Court said (at 611):

> "The prayer for damages, in connection with the injunction, does not at all disparage the dominant equitable character of the proceeding. The awarding of such damages is within the customary powers of a court of equity."

Whatever consequences flow from this conclusion, it is clear that they are due to the voluntary act of the respondent in bringing this commingled type of action. He* drew his own complaint. Having consciously elected to proceed in equity pursuant to §26 of the Anti-Trust Laws, he has voluntarily bound himself by the limitations of such form of action (*American Mills Co.* v. *American Surety Co.*, 260 U. S. 360; *L. A. Westermann Co.* v. *Dispatch Printing Co., supra; DiMenna* v. *Cooper & Evans Co.*, 220 N. Y. 391). If there is a question here of "waiver" of a jury trial as the decision of the Court below indicates (R. 79), the decision of this Court in *American Mills Co.* v. *American Surety Co., supra,* is that a defendant who had asked for legal damages by way of counterclaim in an action at equity had waived its right to trial by jury. If we avoid the label of "waiver", as Judge Cardozo points out in *Di Menna* v. *Cooper, supra* (at p. 395), where a plaintiff had

*"He" is used advisedly. The respondent is a lawyer and the complaint is signed by his firm (R. 38).

combined claims for legal and equitable relief, "the form of action in such a case is that of his own selection" and having selected the court of equity to afford him complete relief he naturally has to abide by the form and practices of that court.* The rule in the Federal courts is the same (*L. A. Westermann Co.* case, *supra, Bellavance* v. *Plastic-Craft Novelty Co.*, D. C. Mass. 30 F. Supp. 37; *Pallant* v. *Sinatra*, D. C. S. D. N. Y. 59 F. Supp. 684; *Williams* v. *Collier*, D. C. Pa., 32 F. Supp. 321).

Nor was the Court below correct in assuming that a separation by the respondent of the issues herein would be met with a claim that the cause of action had been split (R. 81). There is nothing in the Record to support this assumption. The petitioners have not made and would not make any such claim. Since the legal damages relate to alleged injury in the past and the injunctions relate to alleged harm in the future, it is apparent that there could be no such splitting.

We recognize that the Federal Rules allow more than one cause of action to be pleaded in a complaint. The *single civil* action called for by the Federal Rules may contain several causes of action, but if only one cause of action is pleaded, the plaintiff has foregone his right to a jury trial by requesting equitable relief primarily. The Federal Rules did not enlarge the provisions of the Seventh Amendment to the United States Constitution, *Fitzpatrick* v. *Sun Life Assur. Co. of Canada*, D. C. N. J., 1 F. R. D. 713. As the Court said in the *Fitzpatrick* case, *supra* (at 715):

> "The 'civil action' is a mere procedural unit and the joinder, as in this case, of legal and equitable causes of action, which the rules permit, does not re-

*If a plaintiff has the right to bring an action in either a State Court or the Federal Court, his choice carries certain consequences. He could not, for example, bring the action in the State Court and demand that the Federal Rules of Civil Procedure apply merely because they would have applied had he brought his action to the Federal Courts.

> quire or even warrant their being considered as a unit for the purposes of trial. While the rules effect a unity of procedure they do not effect a merger of remedies. Legal and equitable remedies, while they may be administered in the same proceeding, must be administered separately as heretofore. * * * The rights and remedies of the respective parties remain unaffected. Causes of action historically legal are triable by the jury; causes of action historically equitable are triable by the court."

The order of the District Court granted the respondent leave to amend his complaint to state "a cause of action at law for damages" (R. 5). The respondent had the alternative of amending his complaint or of going to trial before a court of equity where, as the *Beaunit Mills* case, *supra*, suggests (124 F. 2d at p. 566), during the course of the trial the Chancellor would impanel a jury to assess damages if necessary.

The distinction between a single civil action and a single cause of action is brought out clearly by the cases cited in the opinion of the court below (R. 80). *Bruckman* v. *Hollzer*, 9 Cir., 152 F. (2d) 730, had one count for money damages and other counts for an accounting and an injunction, the plaintiff demanding a jury trial only on the first count. *Ford* v. *C. E. Wilson & Co.*, D. C. Conn. 30 F. Supp. 163 involved a complaint wherein count one alleged a claim for breach of contract and for tort and count two alleged certain fraudulent acts—jury trial was granted on count one and on certain issues involved in count two, the equitable issues being tried to the court. In *Elkins* v. *Nobel*, D. C. E. D. N. Y., 1 F. R. D. 357, there were four causes of action—the decision was that there should be a jury trial on the last three counts, and the first count the court was to determine by itself taking additional testimony, if necessary, with the jury absent.

It is significant that in none of these cases did the plaintiff have only a single cause of action for mixed legal and equitable relief; it is also significant that jury trial was granted only on clearly legal counts, and not on all counts where some were equitable. The same result must follow in the case *sub judice* and the trial must be held before a Court with a jury impanelled to decide the legal issues if necessary.

**B. The "Basic Issue Test" Applied By the Court Below Is a Novel Test Which, Since It Deals With the Subjective State of Mind of the Pleader Rather Than With the Objective Pleading, Is Unworkable. Even if the Test Be Applied to the Complaint, the "Basic Issue" Herein Is the Injunction Against Arbitration.**

The Court below purportedly applied a "basic issue test" of jury-trial right propounded in 3 Moore's Fed. Prac. 3015, 3016 to reach the result that the case at bar is of legal aspect. Yet the test as developed by Professor Moore from insurance cases deals with an entirely different situation—one in which there is a claim and a counterclaim, one legal and one equitable, and where it is necessary to determine whether the party claiming the equitable relief of cancellation is to be preferred over the party claiming legal relief of damages on the very contract sought to be cancelled. This is not relevant in the case at bar where the petitioners made no counterclaims, legal or equitable.

The respondent herein has argued below, and the Court below has accepted as true, that he is chiefly concerned with his treble damages. Yet the law is not concerned with the mental attitude of the pleader except as evinced in his complaint. As we point out below, the prayers for injunctive relief are far from "academic". If they are not "academic", petitioners are aware of no rule of known law which would permit the District Court sitting as a

court of law to grant injunctions such as are requested in the complaint at bar as an incident to money damages. We submit that the action of the Court below in attempting to read the mind of the respondent who has asked for both legal and equitable relief in order to determine which, in *his mind*, is the dominant relief sought is an unworkable test which never has been previously applied. In any event respondent has had an opportunity to discard these "academic" claims under the order of the District Court (R. 4-5) but has declined to do so. So long as these "academic" claims are in the case they must be defended against.

There is nothing in the Record to support the mind-reading by the Court below that the claim for equitable relief was "within the realm of the academic" (R. 79) and the prayers for declaratory relief and other temporary and permanent injunctions were "gildings of the lily" (R. 78).

Moreover, the Record shows that if there is a "basic issue test" to be applied to the facts at bar, the basic issue herein is the injunction against the clause of the Minimum Basic Agreement embodied in the production contract, providing (R. 30, f. 89) that any dispute:

> "shall be submitted to arbitration and that judgment on the award may be entered in the highest Court of the forum,"

the arbitration being conducted pursuant to the rules and regulations of the American Arbitration Association.

If that arbitration clause is lawful and not enjoinable, the other issues herein, be they legal or equitable, must be determined by arbitration. And this is true whether the Federal Arbitration Law (9 U. S. C. A. §§1 *et seq.*) or the New York State Arbitration Law (Civ. Prac. Act, §§1148 *et seq.*) is to be applied. If the contract is valid,

the Federal courts would be bound by the Federal Arbitration Law and would thereby be ousted of jurisdiction by a valid arbitration provision. Cf. *Murray Oil Products Co.* v. *Mitsui and Co.*, 2 Cir., 146 F. (2d) 381. It is therefore clear that far from being "academic" the equitable relief sought is very real. Indeed it is the "basic issue" herein.

Since the respondent did not avail himself of the leave given him to amend his complaint, he stands firm on his primarily equitable cause of action. In this type of action, jury trial is not available to him. The decision of the Court below reversing the order of the District Court is in conflict with the decisions of this Court and of other Circuit Courts of Appeal and this Court should grant this petition for the purpose of resolving that conflict.

## POINT III.

**Since the Federal Rules did not abolish the distinction between law and equity for the purpose of determining appealability of the order of the District Court to the Court below, they did not abolish that distinction for the purpose of determining the issue of jury trial.**

Judge CLARK who wrote the opinion for the Court below reluctantly accepted, for the purposes of determining the question of appealability, the ruling of this Court in *Ettelson* v. *Metropolitan Life Ins. Co., supra,* holding that the Rules of Civil Procedure did not abolish the distinctions between law and equity. His reluctance is found in the following statement (R. 76):

> "The Supreme Court refused to accept [in the *Ettelson* case] the contention that the union achieved by the federal rules had made the *Enelow* ruling obsolete, saying that the relief afforded by §227 was

> not restricted by the terminology used, but looked to the substantial effect of the order made. Procedural experts have criticized this result as an unnecessary resurrection of procedural fictions, cf. 3 Moore's Federal Practice, 1947 Cum. Supp. §39.01, pp. 29-35; but for our purposes we must of course accept it as gloss upon the statute, intended to promote prompt settlement in a case of the important question of form of trial." (Brackets ours.)

This reluctance led the Court below, it is submitted, to disregard the rationale of the *Ettelson* case when it came to deciding the merits of the appeal. The Court below reverted to its previous theory (expressed by the same judge in the *Beaunit* case, *supra*) and said:

> "Rationally there is no basis upon which to ground such a waiver [of jury trial] short of resurrecting the ancient divisions now abolished to say that plaintiff has brought his 'legal' claims into an 'equitable' cause. This is contrary to that complete union and consolidation of all claims, legal and equitable, in a single civil action which the new rules not only permit, but encourage" (R. 79). (Brackets ours.)
>
> "• • • there is no basis in modern procedure for finding a dichotomy of 'causes of action' between law and equity" (R. 76, footnote).

This reluctance to accept the full implications of the doctrine of the *Ettelson* case which has been followed in cases in other circuits (*Dowling Bros. Distilling Co.* v. *U. S.*, 6 Cir., *supra; United States* v. *Horns*, 3 Cir., *supra*), with all due deference to the Court below, probably accounts for its erroneous ruling on the merits of the appeal, assuming *arguendo* appealability existed.

In order to reverse the order of the District Court, the Court below was required to find that the action was "legal" (R. 77). Brushing aside for the moment the respondent's legerdemain by which the Court below disregarded the claims for equitable relief to make this finding, it is clear that once the Court below found the action was legal, there being no counterclaims by any of the defendants, it follows that the order appealed from was that of a lower Court regulating its own practice and not an injunction by a court of equity against a court of law. The decision of the Court below has attempted by stressing the claimed abolition of law and equity to endow law judges with the powers of equity chancellors to grant injunctions. The Court has gone even further. Although in that part of its decision dealing with appealability it recognized the existence and vitality of the distinction between law and equity, in that part of its decision dealing with the merits of the appeal is suddenly found the distinction moribund and unceremoniously buried it.

Even the court below in making its decision recognized the importance of prompt settlement of the question of form of trial (R. 76). It is submitted that the decision below is of sufficient importance, novelty and inconsistency with prior decisions to warrant the granting of the petition for writ of certiorari by this Court.

## POINT IV.

**The court below struck down a salutary reform of the Rules by denying a separation of issues in advance of trial.**

As we pointed out in our statement of the facts herein, the District Court, in striking the cause from the jury calendar, did not find it necessary to rule on the other alternatives in petitioners' motions (R. 6-7). These alter-

natives were for (1) an order separating the legal and equitable issues and directing that the equitable issues be tried by the Court without a jury or (2) that the issues created by the allegation of violation of the Sherman Act be tried by the Court alone, with the issue of damages, if violation be found, referred to a jury.

If the Court below was correct in deciding that the order of the District Court which held the entire cause triable without jury was in error, it becomes important that the other alternatives in petitioners' motions be ruled upon; for, even if we be wrong in contending that the action is wholly in equity, the converse thereof, that the action is "wholly at law", is certainly not true. In this connection it should be pointed out that the decision of the Court below was not that all of the issues are to be tried to a jury; such a holding, had it been made, would have been clearly erroneous. The Court below stated (R. 80) that under F. R. 38(c) the respondent is entitled to a jury trial "for all the issues so triable".

The problem then is, at what stage of the proceedings is the determination to be made as to which issues are triable to a jury and which to a court. This court has never expressly passed upon the question. The opinion of the Court below states that the separation of issues is "largely a matter of trial discretion" (R. 76 footnote), and further states that the judge "presiding at the jury trial" may decide any equitable issues at the same time. Upon petition for rehearing, petitioners urged (R. 99 *et seq.*) that the mandate should be clarified so that the District Court would be able to rule on the other two alternatives contained in petitioners' motions and not previously ruled on by that Court. The denial of the petition for rehearing indicates that the Court below has interpreted F. R. 39(a) to mean that this may not be done prior to trial. This decision, we respectfully submit, ignores not only the plain wording of F. R. 39(a), but the spirit of the Rules generally.

F. R. 39(a) provides "The trial of all issues so demanded shall be by jury, unless * * * the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist * * * " The Rule says: "court"—not "trial court". The Rule does not even say "The court at the trial". There is, therefore, no authority for implying, as the Court below did, that the motion part of the District Court should not separate the issues as the petitioners' motion prayed in the alternative.

It needs no demonstration, we think, to point out that the spirit of the Federal Rules is the clarification and simplification of the issues prior to trial. Indeed, there is even a pre-trial calendar for the simplification of issues for the trial court. If the motion part is not to separate issues on remand, the case will go to trial on a complaint which the Court below characterized as "lengthy and verbose" (R. 77), with numerous witnesses and several parties coming from California to testify (R. 19, f. 56), and with a jury present—at that time the trial court, to the delay of all parties, will attempt to clarify and separate the issues, of necessity somewhat hastily. It is obvious that in this process the petitioners' ability to defend will be seriously prejudiced.

As we have pointed out, the petitioners intend to prove that the Dramatists' Guild is a labor organization within the meaning of the Anti-Trust Laws. Of necessity, therefore, the petitioners will introduce evidence involving the whole history of the theatre, the relationships between producers and authors, the frauds and vices which existed prior to the time authors commenced to bargain collectively for minimum terms and other conditions connected with their labor. This will involve, as must be apparent, the introduction in evidence of voluminous documents which no jury could properly absorb in the course of the trial.

Moreover, the primary issue in this case is equitable, to wit, whether the arbitration clause contained in the Minimum Basic Agreement is to be enjoined. In such a situation the equitable issues must be tried first by the Court without a jury since if the plaintiff fails to win on these issues, there is no need to determine the subsequent question of damages at law.

*Liberty Oil Co.* v. *Condon National Bank,* 260 U. S. 235, 242;
*Frissel* v. *Rateau Drug Store, Inc.,* D. C. La. 28 F. Supp. 816;
*Pallant* v. *Sinatra,* D. C. S. D. N. Y., 59 F. Supp. 684.

This doctrine was applied in *Hartford-Empire Co.* v. *Glenshaw Glass Co.,* D. C. Pa., 3 F. R. D. 50 to an anti-trust law situation, the claim for treble damages being held triable after the trial of the equitable issues.

Careful search has not revealed a single case in which a Circuit Court of Appeals has refused to allow the District Court to separate the legal and equitable isues prior to trial and has insisted that it be done by the trial court. On the contrary, the cases cited by the Court below (R. 80) are inconsistent with the interpretation of the Federal Rules which the Court below advances. In *Elkins* v. *Nobel,* D. C. E. D., N. Y., 1 F. R. D. 357, the motion part of the District Court in advance of trial had decided which issues were legal and triable to a jury and which were equitable and triable to the Court—indeed, the opinion went further and advised that if additional testimony were necessary on the equitable issues, the Court could excuse the jury and take such testimony. In *Ford* v. *C. E. Wilson & Co.,* D. C. Conn., 30 F. Supp. 163, the District Court prior to trial, in great detail and making all possible assumptions, specifically ruled how the issues were to be separated and how they should be tried. The same

thing was done in *Bruckman* v. *Hollzer*, 9 Cir., 152 F. (2d) 730, and *Bellavance* v. *Plastic-Craft Novelty Co.*, D. C. Mass. 30 F. Supp. 37.

The interpretation of the Federal Rules implicit in the decision below would prevent the clarification and separation of the issues until the trial was actually under way. We submit that this decision on an important question of Federal law is at variance with decisions in other judicial circuits and that this Court should grant the petition for the purpose of definitively interpreting the Rules to the contrary.

## POINT V.

**This Court should grant certiorari herein even though the decision upon which appeal is sought is not a final decision.**

It is clear that the Court has jurisdiction herein under Sec. 240(a) of the Judicial Code, 28 U. S. C. §347(a). We urge this Court to exercise the discretion which it has and grant certiorari even though there is no final decision disposing of the entire matter in the case at bar.

For unless certiorari be granted and this Court rule on the petitioners' contention that the order of the District Court was not appealable to the Court below under §129 of the Judicial Code, 28 U. S. C. §227, this issue can never be passed on by this Court. If the petitioners are, by a denial of the writ of certiorari, forced to a jury trial on all of the issues herein and a final judgment is obtained, the issue of appealability of the order of the District Court has become moot. This Court might at a later date, after a lengthy trial and final judgment, determine whether or not the respondent was entitled to the jury trial which has been granted him. But the issue of appealability, if certiorari be denied, is no more.

Of necessity any question of appealability from the District Court to the Court below must be on something other than a final decision ending the entire matter. If it is such final decision, the argument cannot be made; the question of appealability under 28 U. S. C. §227 turns on just that lack of finality since the question is simply whether the order of the District Court is the equivalent of an *interlocutory* injunction. This court has heretofore granted certiorari in just such circumstances as are here present (*Enelow* v. *New York Life Insurance Company, supra*). In that case, the defendant therein had presented to the District Court an affidavit of defense alleging fraud and prayer for cancellation of an insurance policy and urged that this should be heard in equity in advance of the trial at law. The District Court entered a rule to show cause why the petition should not be granted, and after hearing, made the rule absolute. The order of the District Court was affirmed by the Circuit Court of Appeals and this Court issued writ of certiorari even though no final decision had been had therein. Precisely the same situation exists in the case at bar. Since, as we have already argued (*supra*, Point I) the decision of the Court below in the case at bar is in probable conflict with the decisions of this Court in the *Enelow* and *Ettelson* cases, the same procedure should be followed and writ of certiorari should issue.

Moreover, if writ of certiorari be denied on the ground that a final decision has not yet been entered, a protracted trial will ensue before a court and a jury. As we have pointed out, there are, at the very least, a large number of equitable issues which must be separated by the District Court at the trial. This process, we submit, is more likely to produce error than the orderly separation of the issues in advance of trial. Yet if such error occurs, there will be no relief available to petitioners other than to have an entire new trial on all of the issues. To avoid the

waste of such new trial, as well as to answer the important questions of Federal law involved in the decision of the Court below, this Court should grant the writ herein.

## CONCLUSION.

**For the foregoing reasons your petitioners, by their attorneys, respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit and to the end that the case may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals be reversed.**

Respectfully submitted,

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